87-1754

Supreme Court, U.S.
FILED
APR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY and STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY,

Petitioners,

v.

TIMOTHY JANOWIAK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Richard A. Nussbaum, II
City Attorney
Thomas L. Bodnar
Chief Deputy City Attorney
Robert C. Rosenfeld
Deputy City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241

Attorneys for Petitioners

QUESTION PRESENTED

Is a voluntary municipal affirmative action policy valid if based on evidence of a significant disparity between the racial composition of its employees and its population?

APPENDICES 1a

A. Opinion of the United States Court of Appeals for the Seventh Circuit, in Janowiak V. City of South Bend, 836 F.2d 1034 (7th Cir. 1987) 1a

B. Denial of Petition for Rehearing, United States Court of Appeals for the Seventh Circuit, Dated February 23, 1988 .....43a

C. Order of the Supreme Court of the United States, Janowiak V. City of South Bend, Dated April 6, 1987 .....45a

D. Denial of Petition for Rehearing, United States Court of Appeals for the Seventh Circuit, Dated March 11, 1985 .....47a

E. Opinion of the United States Court of Appeals for the Seventh Circuit in Janowiak V. City of South Bend, 750 F.2d 557 (7th Cir. 1984), Decided December 6, 1984 .....49a

F. Memorandum and Order for the United States District Court for the Northern District of Indiana, Janowiak V. City of South Bend, 576 F.Supp. 1461 (N.D. Ind. 1983),.....86a

G. Memorandum and Order United States District Court for the Northern District of Indiana Janowiak V. City of South Bend, Dated January 27, 1984 .....118a

H. I.C. 18-1-11-1.....125a

TABLE OF AUTHORITIES

CASES

Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987) 14

Hammon v. Barry, 833 F.2d 367 (D.C. Cir. 1987) 14

Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987) ..14,16,17 18,20,21,22

Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984) 18

Janowiak v. Corporate City of South Bend, 836 F.2d 1034 (7th Cir. 1987) 14,15, 21,22

Johnson v. Transportation Agency, __U.S.__107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) 11,12, 14,15,21

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972) 20

Wygant v. Jackson Board of Education, 476 U.S.__, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) 11, 12,16

UNITED STATES CONSTITUTIONAL PROVISIONS

Equal Protection Clause of Amendment XIV 2,12,19,21

STATUTES

28 U.S.C. §1254 1

28 U.S.C. §1331 6

28 U.S.C. §1343 6

42 U.S.C. §1983 2,3,6

42 U.S.C. §2000e 3,6,12

Indiana Code §18-1-11-1 [Repealed] Burns Annot. (1983) 3,4

OPINIONS BELOW

The opinion of which review is sought is reported at 836 F.2d 1034 (7th Cir. 1987), and is reproduced at pages 1a-42a of the Appendix. The district court opinion is reported at 576 F.Supp. 1461 (N.D. Ind. 1983), and is included at pages 86a-117a of the Appendix.

JURISDICTION

The Seventh Circuit Court of Appeals decided this case on December 16, 1987. A timely Petition for Rehearing was filed by the Defendants-Appellees, but it was denied on February 23, 1988.

This court's jurisdiction arises pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based in part upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved are:

(1) 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 42 U.S.C. 2000e:

(a) It shall be an unlawful employment practice for an employer - (1) To fail or refuse to hire or to discharge any individual, ... because of such individual's race, color, religion, sex, or national origin; ...

(3) I.C. 18-1-11-1, (Recodified at I.C. 36-8-3-2) (Appendix - Page 125a.)

STATEMENT OF THE CASE

A. Facts and Background

In 1979, the Board of Public Safety of the City of South Bend, Indiana (City), appointed a panel to investigate the racial hiring policies of the South Bend Police and Fire Departments. In 1980, the Board adopted the recommendations contained in two reports; these recommendations

formed the basis for future hiring procedures in these departments. The South Bend Board of Public Safety had the authority and the responsibility to adopt such a plan and in general to oversee the operation of these departments under the then applicable Indiana statute, I.C. 18-1-11-1.

While the reports did not point to any specific overt discrimination, they found that the racial composition of the two departments had never been reflective of the community and that the recruitment records prior to 1978 were insufficient to allow any thorough analysis. The reports also pointed out that the aggressive recruitment of minorities attempted in 1978 did not make any difference in the percentage

of minorities hired and was not likely to do so in the future. The recommended goal for the future hiring procedures was to bring the racial composition of both departments in line with the racial composition of the city within five years by using two lists of applicants who successfully passed all requirements. Testing requirements remained the same.

In accordance with the reports adopted, the City commenced hiring procedures for the police and fire departments. Timothy Janowiak applied in July of 1980 for a position with the Fire Department; he had the second highest score on the list of successful non-minority Fire Department applicants. In accordance with the

five-year goal, the Board selected four applicants from the minority list and one from the non-minority list. Janowiak at that time had the highest score on the waiting list for non-minorities, but as a result of the test scores of subsequent applicants, he was never hired by the City.

On May 19, 1982, Janowiak filed suit against the City in the United States District Court for the Northern District of Indiana, South Bend Division, alleging that he was denied employment contrary to the Fourteenth Amendment of the United States Constitution, §42 U.S.C. §1983 and 2000e(2)(a)(1). District Court jurisdiction was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5(f)(3).

B. Decisions Below

After the time for discovery had lapsed, the City filed for Summary Judgment. On December 29, 1983, the City won summary judgment on all counts. The district court held that the Board of Public Safety of the City of South Bend was a body competent to adopt an affirmative action plan. The district court further held that since the minority population of South Bend was three times as great as the percentage of minorities employed by the police and fire departments, there was a sufficient basis for adopting an affirmative action plan, irrespective of whether there was any overt discrimination. Also the district court held that the plan in question was reasonable.

Janowiak filed a Motion to Set Aside the Order Granting Summary Judgment on January 13, 1984. On January 31, 1984, the district court denied the motion. On February 29, 1984, a Notice of Appeal was filed with the Seventh Circuit Court of Appeals. Oral argument occurred on September 12, 1984, and on December 6, 1984, the Seventh Circuit reversed the grant of summary judgment and remanded to the district court for further proceedings. In so doing, the Seventh Circuit affirmed the district court ruling that the Board of Public Safety has the power to make findings of past discrimination and undertake an affirmative action plan. However, the Seventh Circuit also held that

statistical disparity without more cannot be the basis for a finding of past discrimination, and that such a finding is a prerequisite to the adoption of a valid affirmative action plan. The City filed a Petition for Rehearing on December 20, 1984. On March 11, 1985, with one dissenting vote, the Petition for Rehearing was denied. A Petition for Writ of Certiorari was filed with the Supreme Court of the United States on June 10, 1985. On April 6, 1987, the Supreme Court of the United States granted a Writ of Certiorari to defendants and ordered the previous judgment vacated with costs and the cause remanded to the United States Court of Appeals for the Seventh Circuit. On December 16,

1987, the Seventh Circuit again reversed the entry of summary judgment in favor of the defendants and again held that the general population cannot create the significant disparity to justify a public affirmative action employment plan. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by defendants. This petition was denied on February 23, 1988.

THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER THE GENERAL POPULATION CAN BE THE BASIS FOR THE COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION EMPLOYMENT POLICY.

When thc the Supreme Court of the United States granted the Writ of Certiorari to the Corporate City of South Bend, it ordered the previous judgment vacated with costs and the cause remanded in the United States Court of Appeals for the Seventh Circuit for further consideration in light of Johnson v. Transportation Agency, __U.S.__, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) and Wygant v. Jackson Board of Education, 476 U.S.__, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). While these two cases contain the parameters of a voluntary affirmative

action plan in the public employment sector, they are wide parameters due to the many differences in the facts and holding of the two cases. Johnson v. Transportation Agency, supra, was a case brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e for alleged reverse sexual discrimination in a promotion. The affirmative action plan in question was based upon the statistics in the internal work force, contained no specific numbers but maintained a flexible long range goal. There was no suggestion that the jobs in question required special educational skills. On the other hand, Wygant v. Jackson Board of Education, supra, was an action brought under the Fourteenth

Amendment to the United States Constitution for reverse racial discrimination in layoffs. The affirmative action plan in question made no provision for flexibility and was based upon a discrepancy between the recial composition of school students and their faculty. The jobs in question, grade school and high school teachers, clearly had unique educational requirements. Some of the above-cited differences are significant; others are not. Given the great width of the parameters, it is understandable that different circuits should reach conflicting conclusions about which law is applicable. However, it is quite clear that a significant statistical difference by

itself creates a complete justification for an affirmative action plan.

Since the decision of this Court in Johnson v. Transportation Agency, supra, three different Courts of Appeals have decided cases involving voluntary public employment affirmative action plans. The District of Columbia Circuit's position, as stated in Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987), is still in a state of flux. In Hammon v. Barry, 833 F.2d 367 (D.C. Cir. 1987), the municipality was granted a rehearing en banc, to be heard in early May, 1988. The Ninth Circuit Court of Appeals in Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), and the Seventh Circuit Court of Appeals in Janowiak v. Corporate City of South

Bend, 836 F.2d 1034 (7th Cir. 1987), reached diametrically opposed conclusions.

The issue of specific disagreement between these two circuits is whether a significant statistical disparity between a city's population and the racial composition of its work force is enough to justify a voluntary affirmative action program.

Both cases involve city fire departments, although Higgins involved a promotion and Janowiak a hiring. Both cases were brought under both Title VII and the Equal Protection Clause of the Fourteenth Amendment. Both cases acknowledged, cited, and looked for guidance to Johnson v. Transportation Agency, supra, and

Wygant v. Jackson Board of Education, supra.

In Higgins v. City of Vallejo, supra, as it was being investigated by the California Fair Employment Practices Committee (FEPC), the city passed an affirmative action employment ordinance. On two occasions in its opinion, the Ninth Circuit discussed the basis for the adoption of the plan. At 823 F.2d 358 it stated:

> As indicated in our discussion of Title VII, the record provides abundant evidence that the City of Vallejo engaged in past discrimination. The state's FEPC report indicates that the City's municipal workforce suffered a serious racial imbalance and that this imbalance was caused, at least in part, by the City's employment practices. The report also contained implied threats of legal action by the

> FEPC if the City did not take affirmative action steps to remedy the racial imbalance.

Yet the discussion referenced above shows that the serious racial imbalance was between the city's employees and the city population, and the black or minority percentage of the city's employees was less than half of the minority or black percentage of the population. The only other evidence cited was that while the city population was 17% black, 10-11% of the new firefighters were black. The only previous reference to the FEPC report was that the report stated "the city's employees were not representative of the racial makeup of the city's population." Higgins v. City of Vallejo, supra, at 823 F.2d 354.

The fact that the FEPC may have explicitly or implicitly threatened legal action cannot be used as bases for the adoption of an affirmative action plan; simple intimidation cannot justify an otherwise unconstitutional action. Nor can any significance be attached to the fact that the observation of the statistics was made by an outside agency rather than the city itself. The Seventh Circuit has always agreed that the South Bend Board of Public Works was an appropriate agency to make the finding of past discrimination. See Janowiak v. Corporate City of South Bend, 750 F.2d 557, 561 (7th Cir. 1984).

The complete factual basis in Higgins v. City of Vallejo, supra, for

past discrimination rests on a comparison between the racial composition of the city population and of its employees. The Ninth Circuit concluded that when there is a significant discrepancy resulting from this comparison, the city may adopt a voluntary affirmative action employment policy and those unrebutted numbers standing alone will protect the municipality from any attack alleging reverse discrimination in violation of either the Equal Protection Clause or Title VII.

The statistics offered by the City of South Bend showed a greater discrepancy than those offered by the City of Vallejo. The Seventh Circuit did not question that the disparity was

significant. Certainly Janowiak and apparently Higgins, the plaintiffs in these two actions, offered no evidence to show that an area work force, however that might be defined, had different racial characteristics than the city population in question. Nor was any evidence offered in either case that a firefighter needed a special educational background. Absent the introduction of such evidence, the Ninth Circuit held that the Vallejo plan constituted an unrebutted articulated nondiscriminatory reason under McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1972) and granted summary judgment on the Title VII claim. Higgins v. City of Vallejo, supra, at

823 F.2d 355. The Seventh Circuit held that the absence of such evidence precluded any entry of summary judgment in Janowiak v. Corporate City of South Bend, supra, at 836 F.2d 1034. In Johnson v. Transportation Agency, supra, the lead opinion clearly states that the articulation of the plan, rather than proof of its validity, is all that is required of the employer. See Johnson v. Transportation Agency, supra, at 94 L.Ed.2d 627.

Furthermore, the Ninth Circuit held that the discrepancy between the racial composition of the city's employees and the population was evidence of apparent discrimination, a prerequisite to summary judgment in an Equal Protection Clause case. See Higgins v. City of

Vallejo, supra, at 823 F.2d 358. The Seventh Circuit said the lack of further statistics is fatal and summary judgment cannot be granted in such a case. See Janowiak v. Corporate City of South Bend, supra, at 836 F.2d 1042.

CONCLUSION

In summary, there is a irreconcilable conflict between the Seventh and Ninth Circuit Courts of Appeal as to whether or not a substantial discrepancy between the racial composition of a municipality's population and its employees can be the basis for a valid voluntary public affirmative action employment plan. This Court should grant Certiorari to resolve that substantial conflict in federal law.

Respectfully submitted,

Richard A. Nussbaum, II
City Attorney
Thomas L. Bodnar
Chief Deputy City Attorney
Robert C. Rosenfeld
Deputy City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241

Attorneys for Petitioners

APPENDIX A

OPINION OF THE UNITED STATES

COURT OF APPEALS FOR

THE SEVENTH CIRCUIT,

IN JANOWIAK V. CITY OF

SOUTH BEND, 836 F.2d 1034

(7th Cir. 1987)

In the

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1321

TIMOTHY JANOWIAK,

Plaintiff-Appellant,

v.

THE CORPORATE CITY OF SOUTH BEND, et al.,

Defendants-Appellees.

Appeal from the United States
District Court
for the Northern District of
Indiana, South Bend Division.
No. 82 C 209 - Allen Sharp, Judge

Argued September 12, 1984-Decided
December 6, 1984
Rehearing and Suggestion for
Rehearing
En Banc Denied March 11, 1985
On Remand from the United States
Supreme Court
Decided December 16, 1987

Before Bauer, Chief Judge, Pell, Senior Circuit Judge, and Dupree, Senior District Judge.*

Bauer, Chief Judge. We again face the question whether the City of South Bend, Indiana (the City) could adopt an affirmative action program for its police and fire departments based solely upon a finding that a disparity existed between the percentage of minorities in the City's population and the percentage of minorities in the departments. The district court granted summary judgment to defendants-appellees, the City and various municipal agencies and officers, holding that the City's

---

* The Honorable Franklin Taylor Dupree, Jr., Senior Judge of the United States District Court for the Eastern District of North Carolina, is sitting by designation.

proffered statistical comparison justified its affirmative action program. 576 F.Supp. 1461 (N.D. Ind. 1983). We reversed. 750 F.2d 577 (7th Cir. 1984). The Supreme Court granted the City's petition for a writ of certiorari, vacated our judgment, and remanded for further consideration in light of Johnson v. Transportation Agency, 480 U.S. _____, 107 S.Ct. 1442 (1987) and Wygant v. Jackson Board of Education, 476 U.S. ____, 106 S.Ct. 1842 (1986). Again, we reverse the district court.

I.

During a June 20, 1979 meeting, the City's Board of Public Safety (the

Board) appointed a task force to design and implement a plan to improve the recruitment of minorities for the City's police and fire departments. The Board noted that the percentage of minorities in the City's population was 14.1 percent and the percentage of minorities in the fire department was approximately 5.3 percent.

The Minority Recruitment Task Force (the Task Force) submitted its report to the Board on January 29, 1980. In the report, the Task Force emphasized that the Board's existing hiring standards were reasonable and advocated

continued use of those standards.[1] The Task Force recommended, however, that the Board adopt a preferential hiring plan to reflect, within five years, the minority composition of the city.

A Minority Recruitment Review Committee (the Committee) then reviewed both the Board's hiring procedures and the Task Force's report and presented its own report and recommendation to the Board. The Committee's report

---

[1] Indeed, the Task Force chairman, in a preliminary report to the Board, stated that the Task Force did not find the Board's hiring procedures discriminatory. The Task Force in its final report to the Board stressed that although minorities requested twenty-eight percent of the applications for fire department positions, only nine percent of those applications were returned. Non-minorities returned their applications at a rate of thirty-seven percent.

noted the disparity between the percentage of minorities in the police and fire departments and the percentage of minorities in the City. Although the Committee determined that the Board's testing standards were reasonable and should be retained, it recommended that the departments utilize separate lists to rank minority and non-minority applicants who achieved a certain base score on the hiring test. A three-member panel would then recommend the number of applicants the Board should hire from each list.

The Board adopted the Committee's recommendations in June, 1980 and, consistent with the affirmative action program, appointed four minority applicants and one non-minority

applicant to the fire department in November, 1980. Although one minority hiree failed the required physical examination, the Board replaced him with the next applicant on the minority hiring list in February, 1981.

Plaintiff-appellant Janowiak ranked second of the twenty-two applicants on the fire department's non-minority hiring list. After Janowiak learned in February, 1981 that he would not be hired as a firefighter, he filed a charge of race discrimination with the Equal Employment Opportunity Commission, which issued a right-to-sue letter in February, 1982. Janowiak then brought suit in the district court, which granted defendants' motion for summary judgment. The district

court, after finding that the statute of limitations did not bar plaintiff's action,[4] held that summary judgment was proper because neither Title VII nor the fourteenth amendment prohibited adoption of an affirmative action program designed to remedy the disparity between the percentage of minorities in the City's population and the percentage of minorities in the fire department. We reversed, holding that the statistical comparison proffered by the City to support the affirmative action program, without more, did not show the predicate past discrimination required to justify such a program under either Title VII or the fourteenth amendment. The Supreme

---

[4] We do not discuss this issue on remand.

Court granted the City's petition for a writ of certiorari, vacated our judgment, and remanded for further consideration in light of Johnson and Wygant.

II

Summary judgment is appropriate when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of persuading the court that no issue of material fact exists. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); see Herman v. National Broadcasting Co., 744 F.2d 604, 607

(7th Cir. 1984), cert. denied, 470 U.S. 1028 (1985). In determining whether an issue of material fact exists, the court must construe the facts alleged in the light most favorable to the party opposing the motion for summary judgment. Id.; see Trulson v. Trane Co., 738 F.2d 770, 771 (7th Cir. 1984). Upon review of a summary judgment, we must consider the entire record in the same light. Cedillo v. International Assoc. of Bridge & Iron Workers, 603 F.2d 7, 11 (7th Cir. 1979).

Initially, we note that Janowiak bears the burden of establishing the invalidity of the City's plan. Under the framework approved by the Court in Johnson,

> [o]nce a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action program provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan....The burden of proving its invalidity [however,] remains on plaintiff.

Johnson, 107 S.Ct. at 1449 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). It is undisputed that the City took into account race in its fire department hiring decisions and that it has asserted its

affirmative action plan as the rationale for those decisions. We thus consider, with Johnson and Wygant in mind, whether the district court should have concluded as a matter of law that the City did not violate Title VII or the fourteenth amendment when it adopted its affirmative action plan in response to a statistical disparity between the percentage of minorities in the fire department and the percentage of minorities in the City's population.

In Johnson, the Supreme Court held that the Transportation Agency of Santa Clara County, California did not

violate Title VII[3] by considering the sex of qualified employee applicants as

---

[3] Petitioner in Johnson raised only a Title VII (and not a fourteenth amendment) challenge to the affirmative action plan. Section 703(a) of the Civil Rights Act of 1964, 78 stat. 255, as amended, 86 Stat. 109, 42 U.S.C. §2000e-2(a), provides that it "shall be an unlawful employment practice for an employer-

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

one factor in making a promotion decision. Johnson, 107 S.Ct. at 1457. Paul Johnson and Diane Joyce were two of seven Santa Clara County employee applicants who achieved the required minimum test score for promotion to a road dispatcher position.[4] Id. at 1447-48. Joyce received the promotion pursuant to a county affirmative action plan designed to achieve long-range parity between the percentage of women and minorities in the county work force and the percentage of women and minorities in the area labor pool. Id. In finding Santa Clara County's affirmative action plan permissible

---

[4] Johnson's test score of 75 tied him for second among the seven candidates. Joyce's 73 was the fourth best score.

under Title VII, the Court held that an employer need not point to its own past discriminatory practices, nor even to evidence of an arguable Title VII violation on its part, to justify a voluntary affirmative action program; rather, the employer need only show the existence of a "manifest imbalance" in a traditionally segregated job category. Id. at 1451 (citing Steelworkers v. Weber, 443 U.S. 193, 209, 212 (1979)). Once an employer justifies its affirmative action plan by establishing the existence of such a manifest imbalance, its plan passes Title VII muster so long as it does not "unnecessarily trammel" the rights of non-minorities. Id. at 1452.

According to the Johnson majority,

to determine whether a manifest imbalance exists to justify an affirmative action plan,

> a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, or training programs designed to provide expertise. Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.

Id. at 1452 (citations omitted).[5]

This suggests that the relevant statistical comparision in Johnson was

---

[5] The Johnson majority stated explicitly that the statistical proof required to establish a manifest imbalance need not be enough to establish a Title VII prima facie case of discrimination against the employer, Johnson, 107 S.Ct. at 1452, as suggested by Justice O'Connor in her separate opinion, Johnson, 107 S.Ct. at 1463 (O'Connor, J., concurring).

between the number of women in the county's skilled craft positions, which included the road dispatcher position, and the number of women in the local labor pool of skilled craft workers. The Court, however, never explicitly made that comparison. Instead, it merely pointed out that in the county's skilled craft job category, none of the 238 positions was occupied by a woman.[6] "Given the obvious imbalance in the Skilled Craft category, and

---

[6] Justice O'Connor, in her concurrence, however, found that because Johnson had conceded that "women constituted approximately 5% of the local labor pool of skilled craft workers in 1970 . . . the statistical disparity would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants," Johnson, 107 S.Ct. at 1465, the showing she would require. Id.

given the Agency's commitments to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Mrs. Joyce in making its decision." Id. at 1455. Thus, as Justice O'Connor pointed out, the Johnson majority found the manifest imbalance requirement satisfied by the existence of the " inexorable zero.'" Id. at 1465 (O'Connor, J., concurring) (quoting Teamsters v. United States, 431 U. S. 324, 342 n.23 (1977)).

In addition to finding the existence of a manifest imbalance, the majority in Johnson also found that the Santa Clara County plan did not unnecessarily trammel the rights of

non-minorities. In emphasizing that the plan did not condone "blind hiring," the Court elaborated on the statistical analysis necessary to determine whether a manifest imbalance exists in a particular job category:

> [H]ad the plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic

> conditions or the number of qualified minority applicants."

Id. at 1454 (quoting Sheet Metal Workers' v. EEOC, 478 U.S. ___, 106 S.Ct. 3019 (1986) (O'Connor J., concurring in part, dissenting in part)). Instead of authorizing such blind hiring, the Santa Clara County plan "expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs." Id. at 1455.

The circuit courts recently have construed Johnson in considering Title VII challenges to affirmative action plans. Unfortunately, what constitutes a manifest imbalance under Johnson

remains unclear in the wake of the two courts' decisions. In Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987), the Ninth Circuit found permissible under Title VII and the fourteenth amendment an affirmative action plan justified in large part by a statistical comparison between the city's work force and its general population. In Higgins,

> [t]he City's affirmative action plan was passed after the California Fair Employment Practices Commission conducted an investigation of the City's employment practices and determined that minorities were conspicuously lacking in the City's work force. The FEPC's 1973 report found that while the City's population was approximately 30 percent minority, only 11.4 percent of the municipal work force was minority. Similarly, while approximately 17 percent of the population was black, only 7.3 percent of the municipal

> work force was black. The report also found that blacks earned considerably less money than whites. In addition, the FEPC report criticized the City for employing personnel practices that facilitated discrimination.
>
> The record also show[ed] a racial imbalance within the City fire department. The first black fire department employee was not hired until 1964. Between 1964 and the issuance of the FEPC report in 1973, only two other blacks received jobs with the fire department. Between 1972 and December 1983, forty-seven firefighters were hired, of whom only five were black. In that period, thirty-six individuals were promoted to fire captain; only one of these individuals was black. In the history of the fire department, only three blacks . . .ha[d] ever held the position of firefighter/-engineer.

Higgins, 823 F.2d at 356. Noting that the plan was adopted as a result of the FEPC's investigation, the Ninth Circuit

concluded that the Johnson manifest imbalance standard was satisfied, even though none of the FEPC's statistical comparisons took into account the relevant qualified area labor pool for firefighters or firefighter/engineers.

In Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987), in contrast, a divided District of Columbia Circuit held that a District of Columbia affirmative action plan violated Title VII because the city failed to satisfy the Johnson manifest imbalance requirement. The court in Hammon accepted the district court's finding that the city's fire department was officially segregated in the early 1950s, but held that the "substantial temporal gap between the time of the Korean conflict...and the

present day...suggest[ed] that something more recent should serve as a predicate for remedial action right now." Id. at 77. The court then rejected the district court's additional finding, based upon a statistical comparison, that vestiges of the past discrimination still existed.

> Under Johnson's teaching, the percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the Washington metropolitan area, not just within the confines of the Nation's Capitol. The reason is that it is undisputed that approximately half of the District's entry-level fighters have hailed from the suburbs. According to the 1980 census, only 29.3 percent of the statistically relevant metropolitan area population

> is black. In view of the fact that the Fire Department work force has a greater percentage of blacks than the area labor force, the District Court's conclusion that vestiges of discrimination remain in the Fire Department is plainly in error.

Id. at 77-78 (citations omitted) (emphasis in original). The D.C. Circuit thus declined "to engage in an entirely artificial comparison between the percentage of blacks in the District's fire department and its population." Id. at 78.

Higgins and Hammons, of course, may not be in conflict. In Higgins, the FEPC report reflected, in addition to the statistical disparities that alone would not have justified an affirmative action plan, that blacks earned considerably less money than whites and

that the city's personnel practices facilitated discrimination. Other evidence in the record also underscored that the city historically had hired very few blacks for fire department positions and that, once hired, very few blacks were promoted. Thus, the Ninth Circuit in Higgins considered more than just general-population statistical comparisons. In Hammon, on the other hand, the court considered a statistical comparison between the percentage of blacks in the District's fire department and the relevant qualified area labor pool that suggested the opposite of a manifest imbalance. The court in Hammon also considered other evidence that the city had been hiring blacks for entry level

positions at an average rate of almost fifty percent since 1969 and seventy-five percent since 1981.

Whatever the inconsistencies, if any, of Johnson's progeny, its holding for our case is clear. In a case such as this one, in which the City has proffered no evidence of an "inexorable zero" and absolutely no other evidence of past discrimination, any proffered statistical comparison must establish a manifest imbalance between the relevant qualified area labor pool and the employer's work force. This is especially true in this case, where the City's Minority Hiring Task Force and its Minority Recruitment Review Committee both concluded that the City's hiring standards and practices

were nondiscriminatory before recommending that the City hire pursuant to an affirmative action plan. Absent a statistical comparison that focuses on the relevant qualified area labor pool, there is no assurance that race is being taken into account "in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." See Johnson, 107 S.Ct. at 1452.

South Bend's voluntary affirmative action plan, therefore, fails to pass Title VII muster. The ax falls because the statistical comparison upon which the City based its plan focused not on the relevant qualified area labor pool but on general population statistics. If a job category requires that

applicants possess minimum qualifications, the City's proffered statistical comparison must narrow its focus to those actually qualified for the position. Because the City here did not offer any evidence of a statistical disparity between the number of minorities in the fire department and the number of qualified minorities in the area labor pool, it failed to establish the manifest imbalance required by Johnson. The City, therefore, was not entitled to summary judgment that its plan did not violate Title VII.

III.

In our previous opinion in this case, we departed from the general principle that a court should not reach

a constitutional issue if it can dispose of the case on other grounds to consider whether the City's plan passed fourteenth amendment muster. 750 F.2d at 563. We noted that most courts that have addressed Title VII and fourteenth amendment challenges to affirmative action plans have analyzed both issues, that the courts' analyses of the two issues were similar, and that a decision on the merits of the equal protection challenge supported our decision on the Title VII issue. Id. For the same reasons, and because the Supreme Court has instructed us to consider both Johnson and Wygant on remand, we again consider Janowiak's equal protection challenge to the City's plan.

In Wygant, five Supreme Court Justices in three separate opinions held that a race-preferential layoff provision in a collective bargaining agreement between school teachers and the School Board of Jackson, Michigan violated the fourteenth amendment's equal protection clause. Wygant, 106 S.Ct. at 1852.[7] The provision, designed to safeguard the Board's affirmative action hiring goals, stated that in the event layoffs were necessary, a greater percentage of minority personnel could not be laid off than the current percentage of minority personnel employed. Wygant, 106 S.Ct. at 1845.

---

[7] The views of the Wygant majority were expressed in a plurality and two concurring opinions. We believe that our analysis comports with all three opinions.

Because there was no majority opinion in Wygant, the Court did not elaborate a clear constitutional standard applicable to all affirmative action plans. We have already noted, however, that a "lowest common denominator' majority position can be pieced together" from the Wygant opinions. Britton v. South Bend Community School Corporation, 819 F.2d 766, 768 (7th Cir. 1987). We start with the benchmark standard agreed upon by the members of the majority (and apparently, according to Justice O'Connor, by all members of the Court): (1) the plan must be justified by a compelling government interest and (2) the means chosen by the government must

be narrowly tailored to effectuate the plan's purpose. See Wygant, 106 S.Ct. at 1852 (O'Connor, J., concurring in part and concurring in the judgment).

According to Wygant's three-Justice plurality, before a governmental unit can establish a compelling interest in remedying discrimination, it must make some showing of prior discrimination on its part. As Justice Powell wrote,

> [t]his Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the government unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Id. at 1847. Thus, Justice Powell wrote, "the relevant analysis in cases involving proof of discrimination by

statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination." In Wygant, therefore, "the proper comparison for determining the existence of actual discrimination by the school board was 'between the racial composition of the [school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.'" Id. at 1847 (citing Hazelwood School District v. United States, 433 U.S. 299, 307 (1977)). Because the School Board in Wygant proffered no such comparison, the plurality found that the Board had not established a compelling interest for its affirmative action plan and

declined to give Jackson another chance to do so. Id. at 1849.[8] Justice White, in his short, blunt concurrence, agreed with the plurality that

> [n]one of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy....Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of discrimination, is quite a different matter.

Id. at 1857 (White, J., concurring).

---

[8] The plurality also held that Jackson's plan was not narrowly tailored to achieving its asserted purpose. The three Justices were especially troubled by the harsh effects of layoffs. As Justice Powell wrote,

> [while] hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of

Justice O'Connor, the fifth member of the Wygant majority, reserved the question whether a racially preferential layoff plan designed "to correct apparent prior employment discrimination against minorities while avoiding further litigation" might ever be constitutionally permissible. See Britton, 819 F.2d at 769 (citing Wygant, 106 S.Ct. at 1854, 1857 (O'Connor, J., concurring in part, and concurring in the judgment)). Because she concurred in the judgment of reversal on the narrowest ground, her

---

[8] continued
their lives. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's plan is not sufficiently narrowly tailored.
Id. at 1851.

opinion is critical to our determination of Wygant's lowest common denominator holding and our dispositionof the present case. See id., 819 F.2d at 769.

Justice O'Connor agreed with the plurality that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program," Wygant, 106 S.Ct. at 1853, and that "[t]his remedial purpose need not be accompanied by a contemporaneous finding of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is

required." Id. To provide an example of a "firm basis" for remedial action, she stated that

> demonstrable evidence of a statistical disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent employer such as a School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Id. at 1856. Justice O'Connor then implicitly found that the affirmative action hiring plan in Wygant, which the layoff provision was designed to protect, was not supported by a compelling government interest because the underlying plan "was tied to the percentage of minority students in the

school district, not to the percentage of qualified minority teachers within the relevant labor pool." Id. at 1857. Because the layoff provision was keyed to a hiring goal that was itself unrelated to remedying past employment discrimination, Justice O'Connor concluded that the plan could not be narrowly tailored to achieving its asserted remedial purpose. Id. at 1849.

Thus, for our purposes, the lowest common denominator holding of Wygant is that a statistical comparison upon which an affirmative action plan is based must compare the percentage of minorities in employer's workforce with the percentage of minorities in the relevant qualified area labor pool before it can establish the predicate past discrimination required to justify

an affirmative action remedy under the fourteenth amendment.[9] We therefore hold that the City's plan here runs afoul of the fourteenth amendment's equal protection clause and that the district court erred in granting the City summary judgment. It is clear under Wygant that, at a minimum, the statistical comparison proffered by the City to justify its affirmative action program cannot focus on general population statistics alone. The City's comparison does just that.

The district court is therefore

REVERSED.

A true Copy:
Teste: _____
Clerk of the United
States Court of Appeals
for the Seventh Circuit

---

[9] Other courts have reached the same conclusion. For Example, in J.A.

9 continued
Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), the FourthCircuit held that Richmond's minority business utilization plan violated the equal protection clause. Under that plan, non-minority prime contractors were required to subcontract at least thirty percent of the dollar value of their public contracts to firms that were at least one-half minority owned. Id. at 1356. The Fourth Circuit rejected Richmond's proffered statistical evidence because it compared the percentage of contracts awarded to minority businesses with the total number of minority residents in the community. Noting that "general population statistics suggest, if anything, more of a political than remedial basis for the racial preference," the court stated that the appropriate comparison should have been between the number of contracts awarded to minority-owned businesses and the number of minority contractors, taking into account other variables such as experience and specialties. Id. at 1358-59.

Similarly, in J. Edinger and Son, Inc. v. City of Louisville, Kentucky, 802 F.2d 213 (6th Cir. 1986), the Sixth Circuit rejected a similar general-

[9]continued
population statistical comparison proffered to justify preferences for minority-owned businesses, stating that "the City is required to show some statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bed funds awarded to those businesses." Edinger, 802 F.2d at 216.

In Higgin, supra, the Ninth Circuit found that the FEPC's report justified the use of an affirmative action remedy under the fourteenth amendment. As we noted in our earlier discussion of that case, however, the Ninth Circuit found in the record before it evidence of prior discrimination in addition to the statistical comparisons, which we feel would have been inadequate standing alone.

APPENDIX B

DENIAL OF PETITION FOR REHEARING, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED FEBRUARY 23, 1988

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

February 23, 1988

BEFORE

HON. WILLIAM J. BAUER, Chief Judge

HON. WILBUR F. PELL, JR.,
Senior Circuit Judge

HON. FRANKLIN TAYLOR DUPREE, JR.,
Senior District Judge*

TIMOTHY JANOWIAK, Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Indiana, South Bend Div.
No. 84-1321 vs.	
THE CORPORATE CITY OF SOUTH BEND, et al Defendants-Appellees	No. 82 C 209 Allen Sharp, Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellees the Corporate City of South Bend, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

---

*The Honorable Franklin Taylor Dupree, Jr., Senior Judge of the United States District Court for the Eastern District of North Carolina, is sitting by designation.

APPENDIX C

ORDER OF THE

SUPREME COURT OF THE UNITED STATES

JANOWIAK V. CITY OF SOUTH BEND

Supreme Court of the United States

No. 84-1936

Corporate City of South Bend, et al.,

Petitioners,

v.

Timothy Janowiak

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the

Seventh Circuit for further consideration in light of Johnson v. Transportation Agency, 480 U.S. ____ (1987) and Wygant v. Jackson Board of Education, 476 U.S. ____ (1986)

IT IS FURTHER ORDERED that the petitioners, Corporate City of South Bend, et al., recover from Timothy Janowiak Two Hundred Dollars ($200.00) for their costs herein expended.

April 6, 1987

Clerk's costs: $200.00

APPENDIX D

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

DATED MARCH 11, 1985

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 11, 1985

BEFORE

HON. WILLIAM J. BAUER, Circuit Judge
HON. WILBER F. PELL, JR., Senior Circuit Judge
HON. FRANKLIN T. DUPREE, JR., Senior District Judge*

TIMOTHY JANOWIAK,
Plaintiff-Appellant,

No. 84-1321 vs.

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC SAFETY, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN AND STANLEY M. PRZYBLINSKI
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

No. S82-0209

Allen Sharp, Judge

*Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, is sitting by designation.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by The Corporate City of South Bend, et al., defendants-appellees, the panel having voted to deny the petition for rehearing, and a majority of the active members of the court having voted to deny a rehearing en banc**

IT IT ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

**Judge Cudahy would have reheard the case en banc.

APPENDIX E

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE

SEVENTH CIRCUIT IN

JANOWIAK V. CITY OF SOUTH BEND

750 F.2D 557 (7th Cir. 1984)

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 84-1321

TIMOTHY JANOWIAK,

Plaintiff-Appellant,

v.

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC SAFETY, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF ROBERT POTVIN, and STANLEY M. PRZYBLINSKI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. S82-0209, Allen Sharp, Judge.

ARGUED SEPTEMBER 12, 1984 -DECIDED DECEMBER 6, 1984

Before BAUER, Circuit Judge, PELL, Senior Circuit Judge, and DUPREE, Senior

District Judge.*

PELL, Senior Circuit Judge. This case presents the question whether the City of South Bend could adopt an affirmative action program for its Police and Fire Departments solely upon the basis of finding that a disparity existed between the percentage of minorities in the population of South Bend and the percentage of minorities in the Departments. The district court granted summary judgment to defendants-appellees, the City of South Bend and various municipal agencies and officers, holding that the City's

---

* Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, is sitting by designation.

statistical comparison justified the implementation of an affirmative action program. On appeal, plaintiff-appellant challenges the court's grant of summary judgment on the grounds that Equal Protection Clause of the Fourteenth Amendment by adopting and implementing an affirmative action program without an adequate finding of past discrimination.

I. Facts

On June 20, 1979, at a meeting of the South Bend Board of Public Safety, the Board appointed a Task Force to design and implement a plan to improve the recruitment of minorities for the Police and Fire Departments. In particular, the Board noted that the percentage of minorities in the

population of South Bend was 14.1% and the percentage of minorities in the Fire Department was approximately 5.3%. At this meeting, the Chairman of the Board, Franklin Morse, stated that he believed that the Board could not institute a preferential hiring system without a finding of past discrimination.

The Minority Recruitment Task Force submitted its report to the Board of Public Safety on January 29, 1980. In its report, the Task Force stressed the fact that although minorities requested 28% of the applications for positions in the Fire Department, only 9% of these applications were returned. By comparison, non-minorities returned their applications at a rate of 37%.

Emphasizing that the Board's hiring standards were reasonable, the Task Force advocated the continued use of the standards. In fact, in a preliminary report to the Board of Public Safety, the Chairman of the Task Force stated that the Task Force did not find that the hiring procedures were discriminatory. The Task Force recommended, however, that the Board adopt a modified two-to-one preferential hiring plan to reflect, within five years, the minority composition of the city.

After reviewing the Board's application procedures for the Police and Fire Departments and the report of the Minority Recruitment Task Force, the Minority Recruitment Review presented a written report and recommendation to

the Board, which was adopted on June 3, 1980. In its report, the Review Committee also noted the disparity between the percentage of minorities in the Departments and the percentage of minorities in the City and declared, "minority representation on the Police and Fire Department should be consistent with the minority composition of the community." Again, the Review Committee reported that it had reviewed the standards for testing, determined that they were reasonable, and recommended that they be retained. Nonetheless, the Review Committee recommended that the Departments utilize two separate lists to rank those minority and non-minority applicants who achieved a certain base score on the hiring

tests. From each list, a three-member panel would recommend to the Board the number of applicants to be hired. The Board of Public Safety adopted these recommendations and, in keeping with the affirmative action program, decided to hire four minority applicants and one non-minority applicant to the Fire Department. The Board appointed these individuals to the Department in November 1980. Although one minority hiree failed the Pension Board physical examination, the Board replaced him with the next applicant on the minority list in February 1981.

Plaintiff in this case, a white male, applied to the Fire Department in July 1980 and completed testing in October 1980. On November 3, 1980, he

received a letter from the Board of Public Safety informing him that, among other things, he ranked second out of twenty-two applicants on the non-minority hiring list. At his deposition, plaintiff testified that he could not remember when he learned of the minority hirings, but that, in any event, Mr. Robert Potvin, Assistant to the Board of Public Safety, assured him on at least two occasions prior to February 1981 that the Board would hire him as a firefighter. Sometime in February 1981, Potvin told plaintiff that he would not be hired and denied ever telling plaintiff that he would be hired. Plaintiff filed a charge of race discrimination with the Equal Employment Opportunity Commission on July 7, 1981,

and the Commission issued a right to sue letter on February 18, 1982.

The district court granted defendant's motion for summary judgment on December 29, 1983, and subsequently denied plaintiff's motion to set aside the order granting summary judgment on January 27, 1984. The district court determined that, although the statute of limitations barred plaintiff's EEOC charge because he failed to file it within 180 days of the Board's decision to hire the firefighters, the statute was equitably tolled by Potvin's assurances that plaintiff would be hired. Reaching the merits of defendants' arguments, the district court held that summary judgment should be granted because neither Title VII nor the Four-

teenth Amendment prohibited the adoption of an affirmative action program designed to remedy the statistical disparity between the percentage of minorities in the Fire Department.

II. Analysis

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). According to the Supreme Court, the party seeking summary judgment bears the burden of persuading the court that no issue of material fact exists. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). See Herman v.

National Broadcasting Co., 744 F.2d 604, 607 (7th Cir. 1984). In determining whether an issue of material fact exists, the court must construe the facts alleged in the light most favorable to the party opposing the motion for summary judgment. Id. See Trulson v. Trane Co., 738 F.2d 770, 771 (7th Cir. 1984).

A. Statute of Limitations

Defendants contend that summary judgment is appropriate because the statute of limitations bars plaintiff's EEOC charge since he did not file it within 180 days after the alleged unlawful employment practice. 42 U.S.C. Sec. 2000e-5 (e). The district court determined that plaintiff failed to comply with the statute of limitations

because the date that triggered the statute was either October 28, 1980, when the Board made its hiring decision, or sometime in November 1980, when the actual hiring occurred. Plaintiff did not file his charge until July 7, 1981, well beyond the 180 day limit under the statute.

The district court decided correctly that the statute of limitations began to run when the Board hired four minority candidates and one non-minority candidate to the Fire Department. In Delaware State College v. Ricks, the Supreme Court held that the 180-day limit begins to run "'from the time of the discriminatory acts, not . . . the time at which the consequences of the acts bec[o]me most painful.'" 449 U.S.

250, 258 (1980) (emphasis in original) (quoting Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979). Plaintiff's claim that he did not learn of the hiring decision until sometime in the spring of 1981 does not affect the conclusion that plaintiff failed to satisfy the statute of limitations. Of course, the statute may be tolled if, due to circumstances beyond his control, a person does not learn of the facts supporting his charge within the statutory limitations period. Wolfolk v. Riveria, 729 F.2d 1114, 1117 (7th Cir. 1984). To determine whether a person was prevented from discovering the necessary facts by circumstances beyond his control, the court must inquire "when 'facts that would support a

charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff.'" Id. (quoting Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975)). See Vaught v. R. R Donnelly & Sons Co., No. 83-2534, slip op. at 4 (7th Cir. Aug. 8, 1984); Coleman v. Clark Oil & Refining Co., 568 F. Supp. 1035, 1038-39 (E.D. Wis. 1983). Under this objective test, plaintiff should have learned of defendants' hiring actions at some point within the 180-day limit. Plaintiff concedes that prior to the completion of the testing process he received a copy of a memorandum entitled "Hiring Procedure" that

set forth many of the details of the affirmative action program. The Board of Public Safety, in its November 3rd letter to plaintiff, referred to plaintiff's number two ranking as his position on the non-minority hiring roster." Although defendants never informed plaintiff in writing of the Board's hiring decision, the decision was discussed at the Board's public meetings and in the local newspapers. These facts do not warrant a finding that circumstances beyond plaintiff's control prevented him from learning of the hiring decision. At the very least, he should have learned of these facts in February 1981 when Potvin informed him that he would not be hired.

Plaintiff contends that his charge

was not time-barred because the discriminatory act - the hiring of four minority applicants and one non-minority applicant - was ongoing until February 1981 when the Board replaced the minority hiree who failed the pension physical with the next applicant from the minority list. The district court rejected plaintiff's theory, finding

> the discretionary acts of selecting and hiring four minority applicants were completed in November, 1980. The act of replacing one of these four minority members with a fifth minority applicant in February of 1981 was a purely ministerial function which did not act to toll the statute of limitations, as it was nothing more than the the implementation of the selection and hiring decisions of October 28, 1980.

(emphasis in original). Analogizing plaintiff's ongoing violation theory to a continuing violation theory, this court agrees with the district court

that the facts in this case fail to support plaintiff's theory. Both Robert Potvin, Assistant to the Board of Public Safety, and Charles Roemer, Chairman of the Board, testified at their depositions that the stated policy of the Board mandated replacing an individual who failed to complete training or to pass the physical with an individual from the same list. Mr. Roemer made this policy public at the Board's October 28, 1980, meeting. Thus, the Board's substitution of one individual who failed the physical with another from the same list did not constitute an independent decision but rather constituted a further implementation of its original decision to hire four minority applicants. To hold

otherwise would undermine the policy underlying the statutory limitations period. Accoridng to the Supreme Court, Congress designed the 180-day limit to "protect employers from the burden of defending claims arising from employment decisions that are long past." Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980) (emphasis added). See Heymann v. Tetra Plastics Corp., 640 F.2d 115, 120 (8th Cir. 1981). In fact, plaintiff challenges as discriminatory in this case the October 28, 1980, hiring decision, not the February 1981 act of replacement.

The district court found that the statute of limitations did not bar plaintiff's charge because the statute was equitably tolled until February

1981 by Potvin's assurances to plaintiff that he would be hired. The statute began running again sometime in February 1981 when Potvin informed him that he would not be hired, and plaintiff filed this suit within 180 days after that date. In Zipes v. Trans World Airlines, Inc., the Supreme Court held that the filing requirement "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. 385, 393 (1982). Accord Vaught v. R.R. Donnelly & Sons Co., No. 83-2534, slip op. at 4 (7th Cir. Aug. 8, 1984); Liberles v County of Cook, 709 F.2d 1122, 1125 cert. denied, 104 S.Ct.

392. To defeat a motion for summary judgment alleging that the statute of limitations operates to bar the suit, the party opposing the motion must demonstrate the existence of a disputed material fact that presents a genuine issue for trial. Posey, 702 F.2d at 105. Construing the facts most favorably to plaintiff, this court holds that plaintiff's claim that Potvin assured him that he would be hired raises the question whether the statute was equitably tolled. Because this question merits a trial, the district court correctly determined that summary judgment should not have been granted on the statute of limitations issue.

B. The Affirmative Action Program According to the Supreme

court, employers may adopt affirmative action programs to remedy past discrimination. United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Race-conscious programs do not, as a matter of law, violate either Title VII or the Equal Protection Clause of the Fourteenth Amendment. They must, however, be based upon findings of past discrimination by a competent body. Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring); Bratton v. City of Detroit, 704 F.2d 878, 886 (6th Cir. 1983), cert. denied, 460 U.S. 1041. This court agrees with the district court that the Board of Public Safety is a body competent to make

findings of past discrimination and to implement an affirmative action program because the Board is the "administrative body legally responsible for the operation of the South Bend Fire Department." Ind. Code Ann. Sec. 36-8-3-2 (West 1983) replacing Ind. Code Ann. Sec. 18-1-11-1 (Burns 1974)).

1. Title VII

In United Steelworkers of America v. Weber, the Supreme Court provided guidelines to analyze the validity of an affirmative action plan under Title VII. 443 U.S. 193 (1979). The court there sustained a plan against a Title VII challenge finding that the plan was "designed to break down old patterns of racial segregation and hierachy" and did not "unnecessarily trammel the

interests of the white employees." Id. at 208. In Weber, the Court held that Title VII permitted an employer to implement a collectively bargained affirmative action program that required the employer to admit 50% black employees into its craft training program until the percentage of black craftworkers mirrored the percentage of blacks in the labor force. In upholding the plan, the Court relied upon more than the glaring statistical disparity between the percentage of black craftworkers employed and the percentage of blacks in the workforce. Id. at 198-99. In fact, the Court took judicial notice of the craft unions' history of excluding blacks from membership. Id. at 198 n.1. See Local 35, Interna-

tional Brotherhood of Electrical Workers v. City of Hartford, 625 F.2d 416, 442 (2d Cir. 1980), cert. denied, 453, U.S. 913 (1981). Delivering to promulgate a general test to distinguish between permissible and impermissible affirmative action plans under Title VII, the Court emphasized that the legality of the affirmative action plan under Title VII rested upon a finding of "conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209 (emphasis added).

Because an affirmative action program must be based upon a finding of past discrimination, this court must determine whether the statistical dis-

parity at issue in this case constitutes a finding of past discrimination. This court concludes that an employer must proffer something more than a finding of a statistical disparity between the percentage of minorities employed and the percentage of minorities within the community to justify the adoption of an affirmative action program. As discussed previously, the Supreme Court's only decision addressing the issue of the validity of an affirmative action plan under Title VII hinged on the Court's finding of purposeful exclusion of blacks from the craft unions. Weber, 443 U.S. 193. See Local 35, International Brotherhood of Electrical Workers v. City of Hartford, 625 F.2d

at 422 (judicial findings of a history of racial discrimination in the construction trades). In a somewhat similar case to this case, the Sixth Circuit acknowledged that statistical data demonstrating an underrepresentation of blacks in the Detroit Police Department constituted evidence of discrimination. Detroit Police Officers' Association v. Young, 608 F.2d 671, 687 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981). The court, however, premised its decision that the affirmative action program was permissible under Title VII on the presence of other indicia of past discrimination. The court noted that black police officers testified that the Department had customarily discriminated against them while they were

on the force, that some evidence suggested that the entry level examinations discriminated against blacks, and that the Department's background investigation procedures created opportunities for discrimination against blacks. Id. at 687, 690.

In the present case, the Board of Public Safety based its finding of past discrimination only upon the statistical disparity between the percentage of minorities in the Fire Department and the percentage of minorities within the population of South Bend. In fact, the Task Force found that the hiring standards were reasonable and should be retained. At a meeting of the Board of Public Safety, the Chairman of the Task Force stated that the past hiring

practices were not discriminatory. The courts that have examined the question whether statistical data suffices to prove past discrimination do not agree on a consistent approach to the issue, although most courts would seem to require additional evidence. See, e.g., Bratton, 704 F.2d 878; Local 35, International Brotherhood of Electrical Workers, 625 F.2d 416; Detroit Police Officers' Association, 608 F.2d 671. In any event, under Weber and this court's previous decision in Lehman v. Yellow Freight System, Inc., 651 F.2d 520 (7th Cir. 1981), in which this court stated that statistical data constitutes "the first step in assessing whether [an] employer decides properly to institute an affirmative action plan," id. at 527

(emphasis added), the district court improperly disposed of the matter on a motion for summary judgment. The court should not have concluded, as a matter of law, that defendants did not violate Title VII by adopting an affirmative action program in response to a finding of past discrimination based solely upon a statistical disparity.

2. Fourteenth Amendment

Although generally the court should not reach a constitutional question if it can dispose of the case on other grounds, this court departs from that approach in this case. Virtually all of the courts that have addressed both Title VII and Equal Protection chall-genges [sic.] to affirmative action plans have analyzed both issues. See,

e.g., Bratton, 704 F.2d 878; Local 35 International Brotherhood of Electrical Workers, 625 F.2d 416. The courts have analyzed both the Title VII and Fourteenth Amendment issues similarly, prompting one court to declare that if a plan passes muster under the more exacting constitutional inquiry, it necessarily withstands challenge under Title VII. Bratton, 704 F.2d 878. This court reaches the merits of plaintiff's Equal Protection claim because the Equal Protection Clause lends even greater support to our decision that the trial court improperly granted summary judgment than does Title VII.

The Supreme Court has not yet articulated the standard of review that applies to racial classifications con-

tained in affirmative action programs. The Court's plurality decisions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), demonstrate that the Court is divided over the question whether the same standard of review applies both to racial classifications built into affirmative action programs and to racial classifications built into other contexts. After reviewing the eleven separate opinions filed in these two plurality decisions, this court agrees with the Sixth Circuit that "the only clear consensus to be garnered from these various statements is that in any affirmative action program (1) some governmental interest must be served, and

(2) the program must somehow be directed toward the achievement of that objective." Bratton v. City of Detroit, 704 F.2d at 885.

Although the Court in Bakke struck down the University's use of quotas to redress societal discrimination suffered by blacks, five of the Justices acknowledged that the government possesses a substantial and important interest in remedying identified discrimination 438 U.S. at 307, 362 (Powell, J., opinion) (Brennan, J., White, J., Marshall, J., Blackmum, J., dissenting). See also Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J., opinion). As with a Title VII challenge, in a case brought under the Fourteenth Amendment, the government must demonstrate that

its remedial program responds to a finding of past discrimination. Absent a finding of past discrimination, the government cannot satisfy the first prong of the constitutional test that requires it to articulate a substantial or important governmental interest underlying the affirmative action plan. The Eighth Circuit discussed the reason why the government must make findings of past discrimination before it constitutionally can adopt an affirmative action program:

> Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.

Valentine v. Smith, 654 F.2d 503, 508

(8th Cir. 1981), cert. denied, 459 U.S. 840 (1982).

Once again, to resolve the question whether defendants have demonstrated an important or substantial interest underlying the affirmative action program, this court must decide whether statistical data constitutes a finding of past discrimination. Under the more exacting constitutional standard, this court now holds that evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities. Even the four dissenters in Bakke seem to agree that the government needs to proffer something more than statistical evidence of a disparity between the percen-

tage of minorities employed and the percentage of minorities in the population to prove past discrimination:

> [A] State government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

438 U.S. at 369 (Brennan, J., dissenting) (emphasis added). Defendants failure to put forward any evidence other than evidence of statistical disparity and their own admissions that the hiring practices appeared reasonable and non-discriminatory persuade this court that they have failed to show the necessary finding of discrimination.

Of course, evidence of a statistical disparity between the percentage of

minorities employed and the percentage of minorities in the general population could, given the presence of additional evidence, demonstrate the existence of past discrimination. For example, the Sixth Circuit in Bratton v. City of Detroit upheld the Detroit Police Department's affirmative action program against a challenge that the Department had failed to make a finding of past discrimination. 704 F.2d at 887. The court considered the statistical data that the City offered and decided that, taken together with other evidence, the statistics demonstrated that the Department had practiced intentional discrimination. Id. at 889. The other evidence of intentional discrimination consisted of evidence and testimony relat-

ing to [n]umerous instances of discriminatory practices in hiring, promotion, the ability to transfer from a patrol position to a plain clothes one and the day-to-day treatment of black officers." Id.

In this case, the district court decided incorrectly that evidence of a statistical disparity between the percentage of minorities employed in the Department and the percentage of minorities within the population of South Bend constituted, without more, a finding of past discrimination. Accordingly, the district court's grant of summary judgment is REVERSED, and this case is REMANDED to the district judge from which this appeal was taken for further proceedings consistent with this opinion.

APPENDIX F

MEMORANDUM AND ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

JANOWIAK V. CITY OF SOUTH BEND

576 F.Supp. 1461 (N.D. Ind. 1983)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TIMOTHY JANOWIAK,

Plaintiff,

vs. Civil No. S82-0209

THE CORPORATE CITY OF SOUTH BEND,

BOARD OF PUBLIC SAFETY,

SOUTH BEND FIRE DEPARTMENT,

MAYOR ROGER PARENT,

TIMOTHY BRASSELL, Fire Chief,

ROBERT POTVIN,

STANLEY M. PRZYBYLINSKI,

Defendants.

MEMORANDUM AND ORDER

I.

This case was filed pursuant to 42 U.S.C. §§ 1983 and 2000e-2(a)(1), by an individual seeking redress for the putative violation of his civil rights

by an alleged act of employment discrimination. Jurisdiction of this court over the claims presented is predicated on 28 U.S.C. §§1331 and 1343 for the civil rights claim, and 42 U.S.C. §2000e-5(f)(3) for the employment discrimination (Title VII) claim. The matter is presently before this court on defendants' motion for summary judgment.[1]

The gravamen of plaintiff's complaint is that he has been subject to reverse discrimination. Specifically, he complains that he was denied employment as a firefighter by the City of South Bend's Fire Department (Fire Department) solely because of his race (caucasian, white). Plaintiff alleges, and the defendants do not deny, that

after submitting to a series of physical and written examinations between July 19, 1980 and October 7, 1980, plaintiff was ranked second on the list of thirty-one applicants for the position of firefighter.

Pursuant to an affirmative action plan adopted by the Fire Department earlier that same year, the list of applicants was in turn divided into two lists: a "minority pool" for non-white applicants, and a "non-minority pool" for white applicants. Nine of the thirty-one applicants were minority members, i.e. black or hispanic, while the remaining twenty-two applicants were white.

On October 28, 1980, it was decided in a public hearing that five applicants

would be hired by the Fire Department. However, rather than simply hire those five individuals with the highest scores (all of whom were white), the Fire Department decided, in keeping with the affirmative action program mentioned above, to hire the four top-scoring applicants from the "minority pool", and the highest scoring applicant from the "non-minority pool". Thus, despite the fact that plaintiff outscored all but one of the white applicants, and all of the minority applicants, he was not considered for employment as a firefighter.

On July 7, 1981, plaintiff filed a charge of employment discrimination against the named defendants with the Equal Employment Opportunity Commission

(EEOC). On February 19, 1982, plaintiff received a notice of right to sue letter from the EEOC, dismissing his discrimination claim. Plaintiff thereupon filed this action, seeking both damages and injunctive relief.

In their motion for summary judgment, defendants raise as their first argument the plaintiff's allegedly untimely filing of his charge with the EEOC. Defendants contend that the plaintiff did not file his employment discrimination complaint with the EEOC within the requisite 180 days, and his failure to do so therefore divests this court of subject matter jurisdiction.

The plaintiff counters by arguing (1) his employment discrimination charge

was timely filed with the EEOC; (2) even if not timely field, the defendants have waived the affirmative defense of the 180-days statute of limitations by failing to raise it during the EEOC proceedings; or, (3) whether the charge was timely filed or not, the actions of one of the defendants' agents were such that the running of the 180-day time limit was equitably tolled. Each of the above will be addressed in its turn.

Plaintiff's argument that his complaint was timely filed with the EEOC is without merit. It is axiomatic that the untimely filing of a charge with the EEOC renders the Title VII claim or the civil rights claim appended thereto subject to dismissal for failure to meet the statute of limitations. United

Airlines v. Evans, 431 U.S. 553, 558 (1977); Heymann v. Tetra Plastics Corp., 640 F.2d 115, 120 (8th Cir. 1981); Stanislaus v. Steorts, 530 F.Supp. 72, 74 (N.D. Ill. 1981).

In order to determine just when the 180-day limit begins to run, one looks first to the language of Section 706(e) of the Civil Rights Action [sic] of 1964: "A charge under this section shall be field within one hundred and eighty days after the alleged unlawful employment practice occurred...." 42 U.S.C. §2000e-5(e) (emphasis added). The Supreme Court has construed "occurred" to mean just that: "[t]he proper focus is upon the time of the discriminatory acts, not upon the time which the consequences of the acts

become most painful." Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (emphasis by the court), quoting Abrahamson v. University of Hawaii, 594 F.2d 200, 209 (9th Cir. 1979).

Applying the above to the facts of this case, it is clear that the allegedly discriminatory acts occurred either on October 28, 1980, when it was decided to hire four minority applicants and only one non-minority applicant, or sometime in November, 1980, when the actual hiring took place. Irrespective of which date is used, however, plaintiff had substantially exceeded the 180-day time limit when he filed his claim with the EEOC on July 7, 1981. See this court's opinion in Battle v. Clark Equipment, Brown Trailer Division,

524 F.Supp. 683, 686 (N.D. Ind. 1981).

Notwithstanding the above, plaintiff argues that the alleged discriminatory act was ongoing, from its inception on October 28, 1980, to its "conclusion" in February of 1981, when one of the original four minority applicants was replaced by another minority applicant due to the former's failure to pass one of the subsequent screening examinations. Suffice it to say that this position finds no support in the case law.

Until the Supreme Court's decision in Delaware State College v. Ricks, supra, the general rule was that a discriminatory act was not final, i.e., the 180-day statute of limitations did not begin to run, until the employment

position sought by the complainant had been filled. Gates v. Georgia-Pacific Corp., 492 F.2d 292, 294-5 (9th Cir. 1974). Accord, see Dumas v. Town of Mt. Vernon, Ala., 612 F.2d 974, 978 n. 2 (5th Cir. 1980); Bethel v. Jefferson, 589 F.2d 631, 636 (D.C. Cir. 1978); Egelston v. State Univ. College at Geneso, 535 F.2d 752 755 (2d Cir. 1976). Irrespective of whether this case law is still valid for the above-stated proposition,[2] it is clear from the facts of this case that the discretionary acts of selecting and hiring four minority applicants were completed in November, 1980. The act of replacing one of these four minority members with a fifth minority applicant in February of 1981 was a purely

ministerial function which did not act to toll the statute of limitations, as it was nothing more than the implementation of the selection and hiring decisions of October 28, 1980. Research by this court has disclosed no cases holding that such a purely ministerial act starts the rerunning of the statutory 180-day time limit. Accordingly, plaintiff's contention that his charge was timely filed with the EEOC is without merit, and must fail

As his second line of defense to defendants' motion for summary judgment, plaintiff argues that, because defendants did not raise the 180-day statute of limitation defense during the course of the EEOC proceedings, they have waived it as an affirmative defense

in this action. This position is also without merit.

At the outset it must be noted that this court is not sitting in appellate review of the administrative decision rendered by the EEOC in the underlying discrimination charge. Rather, this court is sitting de novo.

Rule 8(c) of the F.R.Civ.P. requires that affirmative defenses be specifically raised in a responsive pleading prior to the filing of the answer. Statutes of limitation are specifically listed as affirmative defenses under F.R.Civ.P. 8(c). Affirmative defenses can be waived or equitably tolled. Generally, 5 Wright & Miller, Federal Practice and Procedure §1278 at 339ff (1969).

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Supreme Court specifically held that the timely filing of a charge with the EEOC is not a prerequisite to the district court's exercise of jurisdiction over a Title VII claim. 455 U.S. at 393. However, the Court made clear that a timely filing with the EEOC is tantamount to a statute of limitations, subject to waiver, estoppel, and equitable tolling. Id. Thus, it necessarily follows that, as a statute of limitations rather than a jurisdictional bar, 455 U.S. at 394, the specific pleading of the failure to file in a timely manner mandates the dismissal of the complaint. See, generally, Tillman v. City of Milwaukee, 715 F.2d 354 (7th

Cir. 1983); Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983).

Here, the defendants properly raised the issue of the plaintiff's failure to comply with the statutory 180-day time limit of 42 U.S.C. §2000e-5(e) as an affirmative defense under F.R.Civ.P. 8(c). Because, as noted above, this court is not bound by the underlying administrative proceedings related to the filing of the discrimination charge with the EEOC (indeed, the EEOC proceedings form no part of this court's record herein), the defendants' decision not to raise the affirmative defense of the statute of limitations unless and until the plaintiff's charge gravitated to federal court cannot be construed as a waiver of said defense.

Finally, plaintiff argues that the defendants' "agent", Robert Potvin, told the plaintiff as late as January 1, 1981, that he would be hired despite the October 28, 1980 decision to hire four minority applicants and only one non-minority applicant. Plaintiff insists that, because of this "promise", defendants are estoppel from raising the statute of limitations as an affirmative defense, presumably on a theory of detrimental reliance.

Plaintiff's allegation is that he was not informed until February 1, 1981, by Mr. Potvin that he, the plaintiff, would not be hired. Mr. Potvin's testimony, as set forth in his deposition, contradicts this. Since there are only 156 days between February

Kress & Co., 398 U.S. 144, 157-61, (1970). Even so, the non-moving party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial," in order to defeat the motion. F.R.Civ.P. 56(e). A careful examination of the complete file reveals that the plaintiff has failed to establish the existence of any disputed fact issues warranting the denial of defendants' motion, i.e., plaintiff has failed to come forward with anything to controvent the evidence proffered by the defendants regarding the alleged "impropriety" of their actions.

Analyses of reverse discrimination attacks on affirmative action plans generally proceed under one of two

1, 1981 and July 7, 1981, and such a promise if true, would render the statute of limitations subject to equitable tolling under Zipes v. Trans World Airlines, Inc., supra, a genuine issue of material fact exists. Construing the facts in a light most favorable to the non-movant plaintiff, it is apparent that summary judgment is inappropriate on the preliminary defense of the statute of limitations. Accordingly, this court must turn now to an examination of the merits of plaintiff's claim.

II.

The moving party bears the burden of clearly establishing the absence of any genuine issues of fact material to judgment in his favor. Adickes v. S. H.

theories: Title VII or the Fourteenth Amendment.[4] At the risk of being accused of oversimplification, the legality of affirmative action plans under Title VII must be measured against the standards set forth in United Steelworkers of America, AFL-CIO-CLC, v. Weber, 443 U.S. 193 (1979), while the constitutionality of such plans under the Fourteenth Amendment (and a fortiori, under 42 U.S.C. §1983) must be measured against the criteria enunciated in Regents of University of California v. Bakke, 438 U.S. 265 (1978).

In an extremely careful and well reasoned opinion that is almost on all fours with the case now before this court, the Court of Appeals for the Sixth Circuit outlined the distinctions

between Title VII and Fourteenth Amendment analyses involving municipal affirmative action plans. Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), as modified, 712 F.2d 222 (1983). To survive scrutiny under Title VII, an affirmative action plan (1) must be aimed at breaking down prior patterns of segregation and racial hierarchy, (2) it must not "trammel" unnecessarily the interest of non-minority members, viz, whites, and (3) it must be a purely temporary measure, "to end when the manifested racial imbalance no longer exist[s]." 704 F.2d at 883-84. An important corollary to the above is that a public employer adopting such an affirmative action plan will be insulated from Title VII liability.

Id.; Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982); La Riviere v. EEOC, 682 F.2d 1275, 1279 (9th Cir. 1982); Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), vacated on other grounds, _____ U.S. ____, 103 S.Ct. 2076 (1983).

On the other hand, constitutional analysis under the Fourteenth Amendment is stricter, i.e., the standard to be applied is one of "strict scrutiny." Bratton, 704 F.2d at 886, citing Bakke, 438 U.S. at 361-62. Specifically, there must be a showing that (1) some governmental interest is being served, and (2) the program is directed towards the achievement of that objective. Bratton, 704 F.2d at 885.

However, where as here the

discrimination complained of is directed against those not "traditionally discriminated against," the words "strict scrutiny" take on a different shade of meaning:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain....

Detroit Police Officers' Association v. Young, 608 F.2d 671, 697 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), as quoted in Bratton, supra, at 886.

Before addressing the factual merits of defendants' position, one final note: assuming from the above that the constitutional standard under Bakke is more exacting than that set forth in Weber, it follows that "the Title VII challenge ... is necessarily subsumed into [sic] that made here under the Fourteenth Amendment; what is valid under the latter will certainly pass muster under Title VII." 704 F.2d at 887 (footnote omitted).

Turning now to an examination of the factual merits of defendants' position,

it is clear that they are entitled to summary judgment.

The local government has an undeniably significant interest in mitigating adverse effects on discrimination. Fullilove v. Klutznick, 448 U.S. 448, 497 (1980) (Powell, J., concurring). However, a caveat to the above is that:

> A direct showing of past intentional discrimination is not required to establish the existence of the interest . . . . It is sufficient if findings are made by a body with the competence to act in this area and a review of those findings reveals "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities." Detroit Police Officers v. Young, 608 F.2d at 694 (quoting Bakke, 438 U.S. at 362, 98 S.Ct. at 2784).

704 F.2d at 886 (footnote omitted.)

A careful review of the uncontroverted pleadings discloses that the minority population of the City of South Bend exceeded 14% in 1970, and was 20.7% in 1980 (18.3% black, 2.4% hispanic). In 1980, however, the City of South Bend's Fire Department had barely 6% minority representation. Thus, and irrespective of the question whether there had ever been any overt or deliberate discrimination against minorities by the defendants, the decision of the Board of Public Safety of the City of South Bend on June 3, 1980, to implement an affirmative action program to redress this imbalance and bring the Fire Department's minority representation more closely into line

with the City's population, was consistent with the holding of Fullilove, supra.

Turning now to the determination of whether the remedial measures employed were and are reasonable, this court concludes that they are.

The City's Board of Public Safety adopted a plan of limited duration (five years) in which there are two different pools of applicants, one consisting of minority members, the other of non-minority members. Hiring needs were and are to be met by filling available employment slots with the most qualified applicants from each pool, with a numerical slant in favor of the minority pool's applicants until the

Fire Department's racial composition is more in line with that of the City's general population.

The City's Board of Public Safety is "a body with the competence to act in this area," 704 F.2d at 886, being the administrative body legally responsible for the operation of the South Bend Fire Department. Ind. Code §36-8-3-2.

A determination of "reasonableness" for purposes of ascertaining the constitutionality of affirmative action programs is not measured against the "reasonable man" test so familiar to students of tort law. Rather, determining whether the remedial measures employed are reasonable includes the following:

> an examination of whether any discrete group or individual

> is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives. Regents of the University of California v. Bakke, 438 U.S. at 372- 76, 98 S.Ct. at 2790-92; Fullilove v. Klutznick, 448 U.S. at 518-19, 100 S.Ct. at 2795. If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment. Detroit Police Officers Association v. Young, 608 F.2d at 694. Accord United States v. City of Miami, Florida, 614 F.2d 1322, 1338 (5th Cir. 1980), modified, 664 F.2d 435 (1981) (en Banc).

704 F.2d at 887.5

As noted above, an examination of the record compiled in this action in light of these standards reveals that the defendants' affirmative action plan is reasonable as a matter of law.

Because defendants' affirmative

action program survives constitutional scrutiny, under which the Title VII legality claims are subsumed, there is an absence of any genuine issues of material fact now before this court. Accordingly, defendants' motion for summary judgment is hereby GRANTED in their favor, and against plaintiff. CASE DISMISSED.

Entered this 29th day of December, 1983.

[signed] Allen Sharp
Chief Judge
United States District Court

FOOTNOTES

(1) At a hearing held in open court on September 24, 1982, the parties were given to and including April 1, 1983, in which to file any summary judgment motions. On April 1, 1983, defendants filed their motion for summary judgment. The plaintiff responded indirectly to the motion for summary judgment by filing a motion for leave to file an amended complaint on April 25, 1983. Leave to amend was granted on April 29, 1983. Then, on June 1, 1983, plaintiff filed a motion in opposi-

tion to defendants' motion for summary judgment. The defendants filed a supplemental memorandum in support of their motion on July 13, 1983, and a second hearing was then held in open court the following day on said motion. The plaintiff having filed his supplemental brief in opposition to the motion for summary judgment on October 11, 1983, and the defendants having filed their second supplemental memorandum in support of said motion on October 12, 1983, this matter is now ripe for ruling.

(2) A careful reading of Delaware

State College v. Ricks, 449 U.S. at 255, 256, calls into serious question the continued viability of Egelston v. State Univ. College at Geneso, 535 F.2d 752 (2nd Cir. 1976) and those of its ilk.

(3) Mr. Potvin insist in his deposition at p. 37 that he only indicated plaintiff might be hired, i.e., Mr. Potvin "did not know."

(4) The analysis of claims proceeding under 42 U.S.C., §1983 is indentical [sic] to that under the Fourteenth Amendment where affirmative action plans are at issue. Bratton v. City of Detroit, 704 F.2d 878, 883

n. 15 (6th Cir.) as modified, 712 F.2d 222 (1983). Thus, and for the purposes of this case, whenever the words "Fourteenth Amendment" are used, 42 U.S.C. §1983 may be substituted.

(5) This is not to say that affirmative action is without its serious detractors. See, e.g., that scathing attack on such policies in N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975).

APPENDIX G

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

JANOWIAK V. CITY OF SOUTH BEND

DATED JANUARY 27, 1984

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TIMOTHY JANOWIAK,	)	
	)	
Plaintiff	)	
	)	
v.	)	No. S82-209
	)	
THE CORPORATE CITY OF SOUTH BEND, et al.	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case is presently before the court on plaintiff's Motion to Set Aside Order Granting Summary Judgment. In said motion, plaintiff raises five grounds in support of his contention that the granting of summary judgment on December 29, 1983, was improper. Four of those grounds, captioned as Specifications One, Three, Four and Five, are without merit and/or have

already been addressed by this court, and will not be discussed further.

Unlike the other four grounds, however, plaintiff's Specification Two touches on a pivotal issue: whether the absence of any clear showing of past, overt discrimination on the part of the defendants renders unconstitutional their implementation of the affirmative action plan in question. Plaintiff contends that it does, and at page six of his Brief in Support of Motion to Set Aside Order Granting Summary Judgment, he quotes from Justice Powell's concurring opinion in Fullilove v. Klutznick, 448 U.S. 448 (1980):

> Because the discrimination between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the

> legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred.

448 U.S. at 498.

From the above, plaintiff argues, it follows that, absent a clear showing of "a constitutional or statutory violation," the implementation of an affirmative action plan constitutes an impermissible denial of equal protection against the affected parties, viz., white males.

However, in the same Fullilove opinion, Justices Marshall, Brennan and Blackmun make clear their disagreement with the strict test Justice Powell advocates. At pages 518-19 these justices stated the following:

> We recognize, however, that these principles outlawing the irrelevant or pernicious use of race were inapposite to racial classifications cations [sic] that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination. Such classifications may disadvantage some whites, but whites as a class lack the "'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Because the consideration of race is relevant to remedying the continuing effects of past racial discrmination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny" -- scrutiny that is strict in theory, but fatal in fact.

(footnotes and citations omitted.)

What Justices Marshall, Brennan and Blackmun are here saying is precisely what the Sixth Circuit held in Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), as modified, 712 F.2d 222 (1983), cert. denied, -- U.S. --, (1984):

> (A) case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain . . . .

Id. at 886. Further, and as this court

noted in its decision by memorandum and order, "(a) direct showing of past intentional discrimination is not required to establish the existence of the (protected) interest . . ." Janowiak v. The Corporate City of South Bend, --F.Supp.--, --(N.D. Ind. 1983), slip op. at 11, quoting from Bratton, supra, 704 F.2d at 886.

It is clear that the legal question raised is a close one. However, plaintiff is not raising any issue, factual or legal, regarding the need for a showing of past intentional discrimination on the part of the defendants, that has not already been addressed by this court, and this court sees no reason to set aside its earlier ruling thereon.

Accordingly, and for the above stated reasons, plaintiff's motion to set aside the entry of summary judgment is hereby DENIED.

Entered this 27th day of January, 1984.

[signed] Allen Sharp
CHIEF JUDGE, UNITED
STATES DISTRICT COURT

cc: V. McFadden
R. Hill

APPENDIX H

I.C. 18-1-11-1

I.C. 18-1-11-1

Section 1. The department of public safety shall be under the charge of a board of three (3) commissioners to be appointed by the mayor of such city, as hereinbefore provided: Provided, however, that in cities of the third class, on the adoption of an ordinance therefor, and in cities of the fourth class without such ordinance, the board of public works, in addition to its powers and duties as such board, shall exercise all the powers and perform all the duties in this act assigned to and required of the board of public safety. Not more than two (2) of such commissioners shall be of the same political party. Such commissioners shall each give bond

to such city in the sum of three thousand dollars ($3,000), to be approved by and filed with the city comptroller, for the faithful performance of their duties respectively, as required by this act and by ordinance. Such board shall have the care, management, supervision and exclusive control of all matters and property relating to or connected with the fire and police forces, to the fire alarm, telegraph, fire escapes, the inspection of buildings and boilers, market places and the food sold therein, and to pounds and prisons. Such board shall have power to purchase all necessary supplies and apparatus and make all repairs needed in its department, subject to the same

provisions as are in this act prescribed for the exercise of similar powers by the department of public works. Such commissioners, in cities of the first class, shall receive an annual salary of twelve hundred dollars ($1200) each; and, in cities of the second and third classes, an annual salary of four hundred dollars ($400) each. Such salaries shall be in full compensation whatever for all services of such commissioners. All persons so appointed shall serve during good behavior and shall be of good moral character and be able to speak and write the English language. Such commissioners shall have power, for cause assigned on a public hearing, and on due notice, according to rules to be

promulgated by them, to remove or suspend from office, or for a definite period deprive of pay, any officer or member of such police force, except public works. Such commissioners, in cities of the first class, shall receive an annual salary of twelve hundred dollars ($1200) each; and, in cities of the second and third classes, an annual salary of four hundred dollars ($400) each. Such salaries shall be in full compensation whatever for all services of such commissioners. All persons so appointed shall serve during good behavior and shall be of good moral character and be able to speak and write the English language. Such commissioners shall have power, for

cause assigned on a public hearing, and on due notice, according to rules to be promulgated by them, to remove or suspend from office, or for a definite period deprive of pay, any officer or member of such police force, except that detectives may be dismissed at any time by said commissioners, and they shall have power to make general and special rules and regulations for the government and discipline of said force, and to make and promulgate general and special orders to said force, through the superintendent of police, who shall be the executive head of the force: And, provided further, That, in any city in which a board of metropolitan police commissioners is now or may hereafter be established by

law, such board of metropolitan police commissioners shall have full control and management of the police officers of such city, in accordance with the laws providing for the creation of such boards and prescribing the duties of such police commissioners, and nothing herein shall be construed as affecting the control or management of the police department in any city or cities now or hereafter operating under the laws establishing such board of police commissioners.

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1754

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY AND STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners

vs.

TIMOTHY JANOWIAK,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Patrick T. McFadden
McFADDEN AND McFADDEN
220 S. Taylor Street
South Bend, Indiana 46625
Telephone: (219) 233-9338

Attorneys for Respondent

No. 87-1754

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY AND STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners

vs.

TIMOTHY JANOWIAK,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Patrick T. McFadden
McFADDEN AND McFADDEN
220 S. Taylor Street
South Bend, Indiana 46625
Telephone: (219) 233-9338

Attorneys for Respondent

QUESTION PRESENTED

May a municipality adopt an Affirmative Action Plan that operates to exclude non-minorities from being hired in the absence of any evidence of past discrimination against minorities, other than that minority representation on the municipal fire department is not commensurate with minority representation among the general population of the municipality?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE CASE:	
A. FACTS AND BACKGROUND...	4
B. DECISIONS BELOW.....	9
REASON FOR NOT GRANTING THE PETITION:	
PETITIONER'S ASSERTION THAT THE FEDERAL APPELLATE COURTS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER GENERAL POPULATION STATISTICS CAN BE THE BASIS FOR COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS INVALID.	
A. JOHNSON v. TRANSPORTATION AGENCY and succession cases are distinguished from the instant case	
PETITIONERS' ALLEGATION THAT THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT	

OVER WHETHER THE GENERAL POPULATION CAN BE THE BASIS FOR THE COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS WITHOUT MERIT, i.e., THE CASES CITED ARE DISTINGUISHABLE..... 10

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

Cases

Bratton v. City of Detroit, 704 F. 2d 878 (6th Cir. 1983).... 16

Hammon v. Barry, 826 F. 2d 73 (D.C. Cir. 1987)..... 22,23

Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987).. 17,18,19, 20,21,22

Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984)..... 21,22

Janowiak v. City of South Bend, 836 F.2d 1034 (7th Cir. 1987)..... 1,13, 14,19

Johnson v. Transportation Agency, ___U.S.___ 107 S. Ct. 1442, 94 L.Ed. 2d 615 (1987)..... 10,11,12, 14,17,18, 20,21,22, 23,24

Wygant v. Jackson Board of Education, 476 U.S.___, 106 S. Ct. 1842, 90 L.Ed. 2d 260 (1986)..... 15, 16

United States Constitutional Provisions

Fourteenth Amendment..... 2,7, 25

Statutes

28 U.S.C. §1254..... 1

28 U.S.C. §1331..... 8

28 U.S.C. §1343..... 8

42 U.S.C. §1983..... 2,8

42 U.S.C. §2000(e)..... 3,8

OPINIONS BELOW

The Opinion of which review is sought is reported at 836 F.2d 1034 (7th Cir. 1987), and is reproduced at pages 1a-42a of petitioners' Appendix. The District Court Opinion is reported at 576 F. Supp. 1461 (N.D. Ind. 1983), and is included at pages 86a-117a of the petitioners' Appendix.

JURISDICTION

The Seventh Circuit Court of Appeals decided this case on December 16, 1987. A timely Petition for Rehearing was filed by Defendants-Appellees, but it was denied on February 23, 1988.

This Court's jurisdiction arises pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based in part upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved are:

(1) 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 42 U.S.C. §2000(e):

It shall be an unlawful employment practice for an employer - (1) To fail or refuse to hire or to discharge any individual, ... because of such individual's race, color, religion, sex, or national origin; ...

STATEMENT OF THE CASE

A. Facts and background.

Plaintiff is a Caucasion adult male who met all residency requirements for the South Bend Fire Department, and defendant, City of South Bend is a municipal corporation in the State of Indiana.

On June 20, 1979, pursuant to concerns raised that minority representation on South Bend's Police and Fire Departments seemed extremely low in comparison to minority representation in the city population as a whole, the South Bend Board of Public Safety appointed a task force to look into those concerns.

After some investigation, the Minority Recruitment Task

Force reported that in the 1978 Fire Department recruiting period, 55 of 194 applications were requested by minorities. Only five (5) minority applicants returned completed applications. The Task Force found the standards for testing and recruiting to be reasonable, and the present system (pre-1980) to not be discriminatory. It was recommended that testing standards should not be lowered and should be maintained.

The defendant Board of Public Safety thereafter decided to adopt an affirmative action plan. Two (2) separate hiring lists, one for minority applicants, and another for non-minority applicants, were maintained.

On July 2, 1980, plaintiff applied for a position as a fire-fighter with the South Bend Fire Department, and between July 19 and October 7, 1980, under-went testing. On November 3, 1980, plaintiff was advised that he had successfully completed testing and was ranked second (2nd) on the non-minority hiring list, second overall.

A few days earlier, it had been apparently decided that five (5) applicants would be hired by the Fire Department. Rather than hire the five (5) individuals with the highest scores (all of whom were white), the Board of Public Safety in keeping with the affirmative

action plan, decided to hire the four (4) top-scoring minority applicants, and the top-scoring non-minority applicant. Plaintiff, though he had outscored all applicants but one, was not considered for employment as a firefighter. One of the four (4) minority applicants hired failed to pass a pension physical and was replaced with the next highest scoring minority applicant.

On May 19, 1982, plaintiff, Janowiak, filed suit against the City in the United States District Court for the Northern District of Indiana, South Bend Division, alleging that he was denied employment contrary to the Fourteenth Amendment of the

United States Constitution, 42 U.S.C. §1983 and §2000e(2)(a)(1). District Court jurisdiction was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-f(f)(3).

B. Decisions Below.

Respondent agrees that the Course of Proceedings as noted in Petitioners' "Decisions Below" at pages seven (7), eight (8), nine (9) and ten (10), is an accurate Summary of the Proceedings, to date.

PETITIONERS' ALLEGATION THAT THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER THE GENERAL POPULATION CAN BE THE BASIS FOR THE COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS WITHOUT MERIT, i.e., THE CASES CITED ARE DISTINGUISHABLE.

Petitioners cite Johnson v. Transportation Agency, ___U.S.___, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) and its progeny, as support for their proposition that a conflict exists between the Ninth Circuit and Seventh Circuit over whether general population can be considered as the basis for justifying the adoption of an affirmative action plan.

The Seventh Circuit in its Opinion of December 16, 1987, addressed the question as to whether

its Opinion of December 6, 1984, wherein it (the Court) had held statistical disparity, without more, could not justify the adoption of an affirmative action plan (see Petitioners' Appendix, pp. 49a through 85a) was compatible with this Court's ruling in Johnson, supra.

In Johnson, this Court held that the Santa Clara County, California's Transportation Agency did not violate Title VII by taking the gender of applicants for promotion into account. Johnson, the unsuccessful male applicant, and Diane Joyce were two employees who achieved the minimum test score for promotion. Johnson, supra, 107 S. Ct., p. 1457.

This court held that an employer

need not point to its own past discriminatory practices, or to evidence of a Title VII violation to justify adoption of a plan, but needed only to show the existence of a "manifest imbalance" in a traditionally segregated job category. Johnson, supra, p. 1451. It should be noted that there was no evidence before the District Court that the South Bend Fire Department was "traditionally segregated".

The Seventh Circuit in sorting out the differences between Johnson, supra, and the case herein, seemed to find this court's notation that not one of the 238 positions was occupied by a woman important in establishing manifest imbalance,

and the fact that a different standard of review might be in order where the job was classified as a "skilled craft" position, as opposed to unskilled, in referring to the applicable labor pool, in determining a "manifest imbalance".

It is important to note that the Seventh Circuit in its Opinion below noted that the City proferred "absolutely no other evidence of past discrimination, (and that) any proferred statistical comparison must establish a manifest imbalance between the qualified labor pool and the employer's work force." Janowiak v. City of South Bend, 836 F. 2d 1034 (7th Circuit 1987), p. 1039. The Court emphasized that the City's

Minority Hiring Task Force, and the Minority Recruitment Review Committee both concluded the City's hiring standards and practices were non-discriminatory, Janowiak, supra, p. 1039.

Johnson, supra, is furthermore distinguishable from the instant case in that in the case herein, respondent not only brought a Title VII claim, but also claimed that his Equal Protection Rights were violated.

As this court has noted, to survive constitutional muster, an affirmative action plan must be justified by a compelling governmental interest, and that the means chosen by the government must be narrowly tailored to

effectuate the plan's purpose, Wygant v. Jackson Board of Education, 476 U.S.___, 106 S. Ct. 1842 (1987), p. 106. S. Ct. 1852.

In the case below, there was absolutely no evidence of discrimination other than the statistical disparity between the percentage of minorities on the South Bend Fire Department and minority representation among the City's general population to support adoption of a preferential hiring plan. No evidence of a "compelling" governmental interest was demonstrated.

Furthermore, as an affirmative action plan must not "trammel" unnecessarily the interest of non-

minorities, Bratton v. City of Detroit, 704 F. 2d 878, p. 882 (6th Cir. 1983), a finding of "necessity" must be demonstrated. Not only was there no showing of "necessity" by petitioners, the petitioners' Task Force found no evidence whatsoever of overt or implicit discrimination. Furthermore, as this court held in Wygant, supra, p. 269:

> "Societal discrimination alone is insufficient to justify a racial classification. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing the limited use of racial classifications in order to remedy such discrimination." (Emphasis added).

An important aspect of the case herein, that respondent

believes distinguishes his case from that in Johnson, supra, and Higgins v. City of Vallejo, 823 F. 2d 351 (9th Cir. 1987), is the fact that two (2) hiring lists, one for minority applicants, and one for non-minorities, was an integral part of petitioners' affirmative action plan.

In Johnson and in Higgins, neither of the parties allegedly aggrieved had been initially categorized by race. Indeed, in Higgins, the reviewing court noted that the City Charter emphasized that " ... an orderly system of positive recruitment and competitive examinations ... free of all political, religious and racial and other considerations

not consistent with the merit principal ..." was to be followed. Higgins, supra, p. 354.

Furthermore, race was simply a factor that was to be taken into consideration, and that promotion should be granted only to the qualified. Higgins, supra, p. 354.

An essential factor that distinguishes the case herein from Higgins, supra, and Johnson, supra, is that there were, in addition to the noted statistical imbalance, findings and/or conclusions reached by the bodies that promulgated the respective affirmative action plans.

In Higgins, as the Seventh Circuit noted, the California

Fair Employment Practices Commission (FEPC) criticized the City for employing personnel practices that facilitated discrimination, and that the first black fire department employee was not hired until 1964, and that in the history of the fire department, only three (3) blacks had held the position of firefighter-engineer. Higgins, supra, p. 356. In the matter herein, as the Seventh Circuit correctly observed, not only was there no evidence whatsoever of discrimination, the City's own Minority Task Force found the testing standards and procedures fair, reasonable, and non-discriminatory. Janowiak, supra, p. 1039.

Furthermore, in Johnson, as previously noted, not a single one of the county's skilled employees, out of 238, was a woman, and that given the imbalance, it was not unreasonable for the agency to consider, as one factor, the sex of the applicant. The majority in Johnson, therefore, determined the manifest imbalance test was satisfied by the existence of the "inexorable zero". Johnson, p. 1465.

Another distinguishing factor in Higgins, supra, was that the plan did not establish a quota. The Ninth Circuit Opinion observed that the affirmative action plan " ... established by the City of Vallejo is similarly (citing Johnson,

supra), free of rigid quotas and discriminatory exclusions." Higgins, supra, p. 357.

Unlike the situation in Johnson and Higgins, the City of South Bend adopted an affirmative action plan that ab initio, set aside positions for minorities, thus effectively excluding non-minorities. The Seventh Circuit, in its Opinion of December 6, 1984, noted that the Minority Recruitment Task Force adopted a two-to-one preferential hiring plan to reflect, within five years, minority composition of South Bend, Janowiak v. City of South Bend, 750 F. 2d 557, 558 (7th Cir. 1984), and that in fact four (4) minority recruits were hired, while one (1) white

applicant (the only applicant who outscored respondent) was hired. Furthermore, one of the four minority applicants hired failed a required pension physical, and another minority applicant was immediately hired, Janowiak, supra, p. 1036.

What distinguishes Johnson and Higgins from the case herein is that in those instances, race was a factor to be considered in promotion, while in this case, race was the only factor in determining who to hire.

Furthermore, the District of Columbia Circuit in Hammon v. Barry, 826 F. 2d 73 (D.C. 1987), believes that it is still the law of the land that a finding of prior discrimination " ... is a predicate to

remediation", Hammon, supra, p. 74. Furthermore, the Hammon Court, distinguishing that situation from that in Johnson, supra, explicitly noted that the Court in Johnson " ... repeatedly stressed that the plan set aside no specific number of positions for women or minorities". Hammon, supra, p. 78.

In Hammon, in striking down the affirmative action plan, the Court noted the plan " ... on the other hand, employs precisely that which neither Harvard nor Santa Clara embraced -- the tell-tale, single factor, rigid quota." Hammon, supra, p. 79.

Before concluding, respondent wishes to respond to petitioners' claim at pages nineteen (19) and

and twenty (20) that the burden was on respondent to offer evidence that a firefighter needed a special educational background for employment as a firefighter. It was stated by this Court in Johnson, supra, that once a plaintiff establishes a prima facie case that race or sex has been taken into acount (and it would be ludicrous to suggest anything otherwise in the matter herein), the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, Johnson, supra, p. 1449. Respondent has established a prima facie case, and the petitioner has absolutely no articulable rationale for

establishing a rigid, set-aside, preferential hiring plan.

In conclusion, the apparent conflicts between the Circuits are non-existent. The Seventh Circuit correctly held that the petitioners herein failed to show a manifest imbalance in the qualified labor force (indeed, the petitioner has never attempted to so show), and that the petitioners' plan violates both Title VII and the Fourteenth Amendment.

CONCLUSION

This Court should not grant Certiorari to Petitioners.

Respectfully submitted,

Patrick T. McFadden
220 S. Taylor Street
South Bend, IN 46625
Phone: (219) 233-9338

Attorney for Respondent